United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,780

JOHN A. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

LEE A. FREEMAN, JR.,
Special Assistant United States Attorney.

Cr. No. 370-65

QUESTIONS PRESENTED

Appellee believes that this appeal raises the following questions:

(1) Does the interval between arrest and indictment require dismissal of the charges despite appellant's failure to show that any prejudice resulted and his presentation of a consistent three-witness alibi defense?

(2) Did the trial court abuse its discretion by not permitting inspection of the grand jury minutes when the witness made no inconsistent statements with respect to his previous identification of appellant, and other testimony amply revealed that the witness had become uncertain in the period between indictment and trial?

(3) Was it proper for the trial court to permit leading questions on redirect examination and to tell the jury that their recollection of testimony must govern?

(4) Were the judge's lengthy instructions on the issue of identification inadequate because he refused to stress the identifying witness's "age and intelligence and ability to observe"?

(5) Was testimony as to the manner of appellant's arrest correctly admitted and then limited to the matter of credibility?

INDEX

TABLE OF CASES

Cases—Continued

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,780

JOHN A. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On the evening of December 7, 1964, four men attempted to rob the Big "D" Liquor Store at 4173 Minnesota Avenue, N.E. At the time two employees, Leon Berez and Clyde Boydston, were behind the counter, and police officers Kaclick and Blake were watching the store from a room in the rear. (Tr. 228-230.)[1] The four men,

[1] References to the transcript of the trial proceedings are designated by "Tr.", and the hearings on appellant's motion to dismiss certain counts by "MD Tr.".

armed with a sawed-off shotgun and pistols, rushed into the store and hollered "This is a stickup." (Tr. 287). The intruder with the sawed-off shotgun approached Berez and commanded him to "open the register and lay down." One of the other men went to the walk-in freezer where Boydston was standing, pointed a gun in his face, and told him to get on the floor. (Tr. 289). Another of the hold-up men, Reginald E. Gatlin, opened the door of the room in which the police officers were stationed and pointed his revolver at Officer Blake. (Tr. 246-247.) Officer Kaclick said: "Police, drop it." Instead Gatlin swung around and aimed his gun at Officer Kaclick, who then fired one round at him. Officer Blake also fired and Gatlin dropped to the floor. After these shots, the other would-be robbers began shooting at the police officers. The two officers fired back at the man near the walk-in freezer, but could not stop him from joining his companions and escaping through the front entrance. (Tr. 130-131). As soon as the gun battle ended, Officer Kaclick checked the wounded Gatlin and took his revolver as evidence. An examination of the store revealed pellets from a shot-gun blast embedded in the rear wall, four bullet holes in the filing cabinet behind which Officer Blake had crouched during the exchange of gunfire, three or four more in the wall nearby, and two in the door frame. (Tr. 131-132, 251, 364).

The next incident relevant to this case occurred on December 19, 1964. At 9:40 that morning, Officer Thomas observed a car recklessly "weaving in and out of traffic," approached the car when it stopped at an intersection, and asked the driver, James Hargroves, for his permit and registration card. The names on these two documents did not match each other or the name given by the driver. (Tr. 38, 62). While talking to Hargroves, Officer Thomas saw him place a revolver under the front seat. (Tr. 39). Not wanting to risk an incident in the street, he placed Hargroves under arrest for the traffic violation and told the other four occupants of the car,

which included appellant and Ray Jones, Jr., to leave because he was taking Hargroves to the precinct. The passengers got out of the car, but appellant stated that he had a valid permit and offered to drive the vehicle to the precinct. Officer Thomas assented to this. Everyone then re-entered the car, except one unidentified man. Upon arrival at the precinct, Officer Thomas reached under the seat and removed a .38 caliber revolver. He thereupon asked appellant, who had the key, to open the trunk of the car, and found a sawed-off shotgun there. (Tr. 46). When Officer Thomas next took Hargroves into the precinct, appellant and Jones voluntarily accompanied their friend. Inside the station, Officer Thomas noticed a bulge in appellant's pants pocket, learned that it was a gun, reached into the pocket, and removed a .22 caliber pistol. He then inquired whether Jones had a gun. Jones replied that he did and handed over a .32 caliber revolver. Both men "were placed under arrest and charged with carrying a dangerous weapon." (Tr. 47). A subsequent ballistics test established that the gun seized from Jones had been used by one of the men who attempted to rob the liquor store. (Tr. 400).[2] A few hours later, appellant was placed in a line-up where Boydston identified him as the man who had accosted him in the liquor store. Boyston was then taken into another room to confront appellant, and again identified him. (Tr. 601-605, 613). One of the policemen who supervised the viewing of the suspects, Officer Noone, noted Boydston's reaction and remarks. (Tr. 601-608, 618, 625).

On April 5, 1965, an indictment was filed against Gatlin, Jones, and appellant charging them with four separate counts of assault committed during the attempted robbery. Jones and appellant were also charged with carrying dangerous weapons on the date of their arrest.

---

[2] The trial judge, however, ruled that this evidence alone could not sustain a verdict against Jones, and so granted that defendant's motion for acquittal (Tr. 460).

Before trial, which began on August 24, 1965, appellant moved to sever the dangerous weapons counts. This motion was granted, and a separate trial set for July 1, 1965.[3]

At trial, Boydston pointed out appellant as the man who threatened him with a gun, and testified that he had made a positive identification of appellant at both the line-up and confrontation. (Tr. 311-312, 325, 333, 359). The two police officers who were present when Boydston identified appellant, as well as Officer Blake who spoke to Boydston immediately afterwards, attested to the unqualified manner of his identification. (Tr. 604-608, 620, 622).[4] These officers did testify, though, that in a pre-trial conference Boydston could not recall his exact response at the line-up and confrontation until he refreshed his memory by looking at the notes of a police officer. (Tr. 606-608, 625).

Appellant testified in his own behalf. He flatly denied any participation in the crime, asserted that he had spent the evening of December 7, 1964, watching television at his girl friend's apartment, and gave a rather detailed account of his activities for that entire day. (Tr. 516-523). His girl friend, Miss Deborah Perry, and her neighbor, Mrs. Morgan, fully corroborated appellant's alibi. (Tr. 553-559, 569-573). In order to persuade the jury that appellant was not at the scene of the crime, his counsel not only stressed Boydston's lack of opportunity to make an accurate identification, but also attacked Boydston's credibility. In the latter respect, appellant offered the testimony of Mr. Aaronson, counsel for co-defendant Jones, and Mr. Reed, an investigator for the Legal Aid Agency, that during several interviews Boydston had indicated that he failed to get a "good look" at

---

[3] On that date the two counts were dismissed for lack of speedy trial.

[4] For example, Officer Noone stated there was "no doubt in [Boydston's] mind that [Johnson] was one of the subjects who took part in the holdup." (Tr. 605).

his assailant and that he was uncertain about his identification of appellant. (Tr. 513-513, 581-585)[5] Boydston testified that he did not remember making such statements.

The trial judge instructed the jury that the evidence raised the issue whether appellant had been present at the scene of the crime, and cautioned them that they had to be convinced beyond a reasonable doubt that appellant was the person who committed the attempted robbery.

The jury returned a verdict finding appellant guilty of assault with intent to commit robbery (22 D.C. Code § 501), assault with intent to commit robbery while armed with a dangerous weapon (22 D.C. Code § 3202), and two counts of assault upon the police officers (22 D.C. Code § 505). Appellant received sentences of 56 months to 14 years for the first two offenses and one to three years for the latter offenses, said sentences to run concurrently.

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 501, provides:

> Every person convicted of any assault with intent . . . to commit robbery . . . shall be sentenced to imprisonment for not more than fifteen years.

Title 22, District of Columbia Code, Section 505(a), provides:

> Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the preformance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both.

---

[5] Witness Reed also asserted that Boydston had related that he told a United States Attorney he could not positively identify appellant. (Tr. 585).

Title 22, District of Columbia Code, Section 3202, provides in pertinent part:

> If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; . . .

Rule 48(b), Federal Rules of Criminal Procedure, provides:

> *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

SUMMARY OF ARGUMENT

In the absence of any prejudice, the fact that 107 days elapsed between appellant's arrest and indictment does not entitled him to relief from his conviction. It is manifest from appellant's alibi defense at trial that this interval did not put him at any disadvantage. Not only was appellant able to recite all his activities on the date of the attemped robbery, but he also produced two witnesses who testified that they had watched television with him that evening. The delay instead weakened the prosecution's case by causing its witness not to recall whether he had made a "positive identification" when he viewed appellant upon the latter's arrest. And defense counsel fully exploited this uncertainty to discredit the identifying witness. The record thus discloses no abridgement of appellant's right to a speedy trial.

A prosecution witness, Clyde Boydston, stated without contradiction that he had positively identified appellant as his assailant. Testimony of other witnesses for both

sides then revealed that during the period between indictment and trial Boydston had expressed doubt as to his identification. On this basis, defense counsel sought to examine the transcript of Boydston's grand jury testimony. The trial court denied this request on the ground that any inconsistencies would be merely cumulative on the question whether Boydston could remember his initial identification of appellant. As premised on the existence of adequate testimony relating to Boydston's credibility, this ruling was a proper exercise of discretion. Moreover, an inference that Boydston's statements to the grand jury differed from his account at trial was not compelled simply by his inability to remember making certain statements to investigators—the sole "discrepancy" between his trial testimony and that of defense witnesses. In view of the unlikelihood that inspection of the grand jury minutes would disclose any contradictions in Boydston's testimony not already stressed by the defense, the trial court's ruling does not constitute reversible error.

Over defense counsel's objections, the trial judge permitted the prosecutor to ask certain leading questions on redirect examination of Boydston. This ruling properly reflects the prosecutor's right to attempt to rehabilitate his witness and dispel impressions the jury received from cross-examination by having the witness reiterate direct testimony. During their deliberations, the jury sent a note to the judge asking that he clarify certain testimony for them. The judge replied that "your recollection must govern." While appellant contends that the judge should rather have restated the testimony in question for the jury, he presents no reason to disturb the trial judge's exercise of discretion. The defense counsel raised no objection when this incident occurred, and appellant does not specify how the court's refusal to answer the jury's inquiry prejudiced him.

The trial judge instructed the jury to weigh the credibility of the identifying witness and to consider "the possibility of human error or mistake." He further empha-

sized that the jury had to resolve a conflict in evidence as to whether appellant had participated in the attempted robbery, and that the prosecution had to establish the identity of appellant as one of the holdup men beyond a reasonable doubt. Since these instructions were entirely adequate, it was well within the judge's discretion to decline to enumerate factors cited by defense counsel as throwing doubt on the accuracy of the identification or to marshal evidence for appellant. The other portion of the charge attacked by appellant as imprecise did not provoke an objection in the lower court, and so cannot now be reviewed. In any event, the extreme unlikelihood that the charge mislead the jury makes reversal completely unwarranted.

At the outset of trial, the prosecutor offered testimony of the police officer who arrested appellant and co-defendant Jones. His description of the events surrounding the arrest was essential to develop the theory by which the prosecutor sought to link Jones with the crime. After Jones obtained an acquittal, the judge cautioned the jury that they could only consider the police officer's testimony for the limited purpose of testing appellant's credibility, the latter having testified in his own behalf. It was not erroneous to admit such evidence on this limited basis. By putting his credibility in issue, appellant could expect that the police officer's testimony would be used for purposes of impeachment, and any possible prejudicial effect was removed by the judge's instructions.

ARGUMENT

I. The interval between appellant's arrest and indictment amounted to neither a denial of his right to a speedy trial nor an undue delay within the meaning of Rule 48(b).

(Tr. 316-20, 324-26, 331-34, 513-15, 519, 553-573, 582-84, 605-08, 622-25. MD. Tr. 18-21 23-24.)

Relying upon the Fifth and Sixth Amendments and Rule 48(b), F.R.Crim.P., appellant contends that the

charges against him should be dismissed for alleged "unnecessary delay" between his arrest and indictment. But this delay does not in itself amount to an abridgement of constitutional guarantees. Appellant's conviction cannot be disturbed unless he shows that the delay was "arbitrary, purposeful, oppressive or vexatious," *Smith* v. *United States*, 118 U.S. App. D.C. 38, 41, 331 F.2d 784, 787 (1964) (*en banc*), and that he suffered some prejudice from the delay. *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F.2d 705 (1965). Just last term, in *United States* v. *Ewell*, 383 U.S. 116, 122 (1966), the Supreme Court held that "insubstantial" and "speculative" claims of prejudice from a delay of nineteen months between arrest and indictment would not support motions to dismiss indictments for denial of the right to a speedy trial.[6] And this Court has recently interpreted *Ewell* to mean that appellant must show "the likelihood, or at least reasonable possibility, that [he] has been prejudiced by the delay." *Hedgepeth* v. *United States*, —— U.S. App. D.C. ——, 364 F.2d 684, 687 (1966).[7] Appellant's allegations fall far short of this standard.

The delay did not impair in the least appellant's capacity to recall what he had done on the date of the crime, or to find witnesses to corroborate his story. He testified that he had spent the evening of the attempted robbery at his girl friend's apartment. He claimed to be certain about the date because he had received a traffic ticket and made some repairs on his car that same day.[8] Defense counsel then produced two unshakeable witnesses to support this alibi. Miss Perry stated that appellant

---

[6] The delay there was due to the fact that the indictments under attack were not brought until appellants' convictions for related offenses had been vacated on collateral attack.

[7] *Jackson* v. *United States*, 122 U.S. App. D.C. 124, 351 F.2d 821, (1965), cannot be cited to the contrary. While the Court there stated that a delay might be so lengthy as to give rise to a presumption of prejudice, it held that a showing of prejudice was still necessary with respect to a five-month delay. Moreover, that dictum antedates the decision in *Ewell*.

[8] The traffic ticket was put into evidence. (Tr. 519).

watched television in her apartment on December 7, 1964, and recited a number of unusual circumstances that caused her to remember the day in question. These included the fact that Johnson had called her very early in the morning, showed her the receipt for his traffic ticket, "kept running in and out that day," and had sexual relations with her that "hurt very much." (Tr. 553-566). In addition, Mrs. Morgan was "sure" she had watched television in the apartment with them that evening (Tr. 569-573). Having presented a consistent three-witness alibi defense, appellant can scarcely assert that the delay made it more difficult for him to establish his whereabouts at the time of the alleged offense "on account of lost witnesses and faded memories due to the passage of time." [9]

Appellant suggests that the delay prevented his counsel from making "timely investigation of the identification at the police line-up" by Boydston. But the delay, if anything, worked to the prosecution's disadvantage. See *King* v. *United States*, 105 U.S. App. D.C. 193, 194, 265 F.2d 567, 568 (*en banc*), *cert. denied*, 359 U.S. 998 (1959). A defense counsel and investigator testified that Boydston had several times expressed uncertainty to them about his identification of appellant (Tr. 316-320, 324-326, 331-334, 582-584, 13-15). It was also brought out at trial that Boydston could not recall exactly what happened at the line-up without reference to notes taken by a police officer. (Tr. 605-608, 622-625). Officer Noone testified that Boydston had said "he could not remember what went on back six or seven months ago" (Tr. 608), and Officer Blake stated that Boydston had complained "that there had been so many lawyers out to talk to him that he had gotten confused." These circumstances were stressed by trial counsel to impeach Boydston. It is in-

---

[9] *Hanrahan* v. *United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965). This case may be easily distinguished since "defense records were lost or destroyed" as a result of the delay and witnesses were unable to recall the events at issue.

consistent for appellant now to argue that since the passage of time weakened Boydston's identification it hampered the preparation of his defense.

The mere fact that appellant was confined while awaiting trial does not constitute the type of prejudice that must be shown to establish violation of constitutional rights. See *Hood* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d 949 (1966) (delay of 106 days between arrest and indictment); *Hankins* v. *United States*, D.C. Cir. No. 20,315, aff'd by order filed December 9, 1966 (73 days between arrest and indictment). While "unexplained" delays before indictment should not be condoned,[10] appellant does not suggest that the delay in this case resulted from "negligence or callous indifference" which approaches constitutional proportions. *Hedgepeth* v. *United States*, —— U.S. App. D.C. ——, 364 F.2d 684, 688 (1966).

Since appellant has failed to demonstrate that any prejudice resulted from the delay of 107 days between arrest and indictment, his contention that he was denied a fair and speedy trial must be rejected. See *Hedgepeth* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d 952 (1966).

There is similarly no basis for appellant's contention that the interval between arrest and indictment constituted an "unnecessary delay" within the meaning of Rule 48(b).[11] A motion to dismiss under Rule 48(b) is committed to the sound discretion of the trial judge. His ruling on such a motion will be reversed only for abuse of discretion, that is, only upon a showing that he acted in a "clearly unreasonable manner." *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 341, 323 F.2d 808, 811

---

[10] The delay partly reflects the need to assemble evidence against appellant and others on a number of related charges (MD Tr. 18-21).

[11] While Judge Youngdahl dismissed the counts charging appellant with carrying a dangerous weapon, he predicated his ruling upon the fact that these offenses were simple to take before the grand jury (MD Tr. 23-24).

(1963). This requires more than highly conjectural claims of prejudice from the delay.

II. The trial judge did not abuse his discretion by refusing to permit inspection of the grand jury minutes.

(Tr. 311, 318-19, 324-26, 333-34, 582-83, 603-08, 620, 624-25)

Appellee submits that the trial court's ruling upon defense counsel's motions to inspect Boydston's grand jury testimony were not erroneous inasmuch as the record discloses no "particularized need" for examination as required by *Dennis* v. *United States*, 384 U.S. 855 (1966).[12] On both direct and cross-examination, Boydston testified that he had positively identified appellant from a group of suspects and had confirmed this identification when confronted with appellant immediately afterwards. (Tr. 311, 325). This testimony was not directly contradicted by any other witnesses. Indeed, each of the police officers present at the line-up and confrontation gave descriptions of Boydston's reactions which accorded with his account in every detail. (Tr. 603-605, 620). Nor can it be said that Boydston made any conflicting statements during trial which indicated that he related these matters differently before the grand jury. Appellant's trial counsel sought to inspect the grand jury minutes on the ground that Boydston had previously expressed doubt as to his identification in interviews with an investigator and defense counsel. These men testified that Boydston had told them he got only a "fleeting glimpse" of appellant and that he saw "one man in the line-up that reminded him more than the others of [his assailant] but that he

[12] That decision noted that a "particularized need" had been shown by a number of factors missing from this case. For instance, the grand jury testimony had been taken seven years before the trial; alleged guilt turned on the import of statements made in the course of a lengthy conspiracy; one witness admitted that he had been mistaken in earlier statements; and two of the witnesses were accomplices, one being a paid informer.

could not positively identify him." (Tr. 582, 583). Boydston stated many times that he could not recall making any such statements. (Tr. 318-319, 324-326, 333-334). But his failure to remember the content of these conversations does not justify an inference that he characterized his identification of appellant as less than positive before the grand jury. See *Jackson* v. *United States*, 111 U.S. App. D.C. 353, 297 F.2d 195 (1961). The testimony of the defense witnesses admittedly showed that Boydston was uncertain before trial as to the type of identification he had made many months ago. But counsel hardly needed the grand jury minutes to further emphasize this fact. Noone and Blake related that during a pre-trial conference Boydston could not reaffirm his positive identification until he looked at the notes taken by one of the police officers on December 19th. (Tr. 606-608, 624-625). The jury was thus made aware by testimony from both sides that Boydston had been somewhat confused in the period between the line-up and trial. If the grand jury minutes had disclosed any evidence to this effect, it would simply have been cumulative. See *Simmons* v. *United States*, 113 U.S. App. D.C. 369, 308 F.2d 324 (1962). Moreover, defense counsel impugned Boydston's credibility by repeatedly asking whether he could remember making the statements attributed to him by two other witnesses. In these circumstances, it was not an abuse of discretion to deny counsel access to Boydston's grand jury testimony.[13]

---

[13] On cross-examination Boydston responded affirmatively to a question whether he had "continuously been positive of this identification." (Tr. 325). While the discrepency between this statement and his manifest uncertainty before trial bears on his general credibility, it has slight relevance to his attitude at the line-up.

III. The trial court did not err (a) by allowing leading questions on redirect examination of Boydston or (b) by refusing to clarify the testimony of Officer Kaclick at the jury's request during deliberation.

(Tr. 682)

Appellant's contention that the prosecutor's leading questions on redirect examination of Boydston amount to reversible error contradicts the only authority that he cites, *i.e.*, *United States* v. *Durham*, 319 F.2d 590 (4th Cir. 1963). In that case, the Court of Appeals explicitly recognized that the use of leading questions was permissible when needed "to make specific points in rebuttal." At 593. The circumstances which appellant labels as causing prejudice indicate instead that the prosecutor clearly had the right to attempt to rehabilitate his witness.[14] For this purpose, he did not elicit any new information from Boydston, but simply tried to stress testimony given on direct examination. The trial judge correctly overruled objections to this effort.

Despite his argument heading, appellant objects to the trial court's failure to answer the jury's inquiry in the affirmative, rather than its so-called "private communication" with the jury. But when the judge informed counsel about his action at trial, no one objected. (Tr. 682). This absence of objection "forecloses review of the asserted error." *United States* v. *Indiviglio*, 352 F.2d 275, 277 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). See *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1963). Even if this point had been preserved, the jury's question was not highly relevant to the issues in the case, and appellant has failed to specify what prejudice he suffered from the trial court's refusal to tell the jury that Officer Kaclick had

---

[14] As stated in *United States* v. *Durham*, 319 F.2d at 594; "The United States Attorney merely permitted his witness to restate prior testimony and eliminate an appearance of confusion which may have arisen as a result of certain testimony on cross-examination."

said he exchanged shots with the man by the freezer. In these circumstances, the trial court cannot be said to have abused its discretion as to whether to restate testimony for the jury. *United States* v. *Jackson*, 257 F.2d 41 (2d Cir. 1958).[15]

IV. The trial court's instructions with reference to appellant were complete and correct.

(Tr. 648-49, 663-69; Tr. A50-52, 55-59)

Appellant makes two separate attacks upon the jury instruction. He directs one complaint against the following portion of the charge:

> "If you find that Gatlin was the only defendant present at the scene of the crime, then in order for Gatlin to be guilty of the crime, you must find that his acts comprised all the elements of the alleged crimes as I shall outline them to you. If you find, however, that both Gatlin and Johnson were present at the scene of the crime and that they were acting together and in concert and for a common purpose, then it is not necessary that each defendant shall have committed each and every act that comprise the essential elements of the crime." (Tr. 667).

On the assumption that the strong evidence against Gatlin made the jury anxious to have him convicted, appellant suggests that this allegedly erroneous instruction pressured the jury to find Johnson present at the scene of the crime. By failing to mention that co-defendant Gatlin could be convicted if he acted jointly with other persons unknown, so the argument apparently runs, the judge left the jury with the impression they must either find that Gatlin committed all the elements of the crime

---

[15] While it might have been preferable for the judge to consult with counsel before sending the note to the jury, his failure to do so had no effect upon appellant's "opportunity to defend himself." *Downing* v. *United States*, 348 F.2d 594, 601 (5th Cir.), *cert. denied*, 382 U.S. 901 (1965).

himself or that Johnson's participation supplied any missing elements in order to find Gatlin guilty.

Since no objection was made to these instructions at the trial level, appellant may not urge this point as a basis for reversal unless he can show "plain error" pursuant to Rules 30 and 52(b), F.R.Crim.P. *Kelly* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 61 (1966); *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956). And this Court has been reluctant to reverse convictions for alleged defects in instructions when defense counsel indicated no dissatisfaction in the lower court. *Robertson* v. *United States*, —— U.S. App. D.C. ——, 364 F.2d 702 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963); *Wright* v. *United States*, 116 U.S. App. D.C. 60, 320 F.2d 782 (1963); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

On this basis, appellee submits that the full instructions directed to this point were adequate. The alleged error was erased by the judge's subsequent statement that: "If several persons act jointly or in concert, each performing a part that results in the commission of an offense, then all are equally guilty." (Tr. 668). The jury heard extensive and uncontradicted testimony that four men had attempted to rob the liquor store; common sense would have made them consider Gatlin's acts in connection with the other men besides appellant.

In any event, it is much more probable that the jury—if intent upon Gatlin's conviction and uncertain whether appellant had participated in the holdup—would have concluded that Gatlin committed all elements of the offense charged, a finding fully supported by the evidence.[16] The

[16] Appellant misplaces reliance upon *Cooper* v. *United States*, —— U.S. App. D.C. ——, 357 F.2d 274 (1966), and *Inge* v. *United States*, —— U.S. App. D.C. ——, 356 F.2d 345 (1966). Those cases simply held that the trial judge's instructions must define all elements of the crime and must mention the defenses which are raised by defendant's theory of the case and the evidence.

extreme unlikelihood that the challenged instructions induced the jury to return a verdict against appellant makes reversal completely unwarranted.

Appellant further complains that the trial court did not sufficiently emphasize that the jury must find he was the person who committed the crime, or sufficiently elaborate the factors which the jury should apply to evaluate Boydston's testimony. But the alleged absence of such instructions in the circumstances of this case hardly constitutes reversible error.

The judge first directed the jury to weigh the credibility of each witness (Tr. 663-664), and then gave the following instructions:

> "The identity of the defendant as the person who committed the crime is an element of every offense. As such, the burden is on the Government to prove beyond a reasonable doubt not only that the crime was committed but also that the defendant was the one who committed it. In weighing the testimony of a witness as to identity, the possibility of human error or mistake and the probable likeness or similarity of objects or persons are elements which you should consider. After considering all the evidence, you must be satisfied beyond a reasonable doubt that the defendant was the one who committed the crime charged in order for you to find him guilty. . . .
>
> If facts and circumstances have been introduced into evidence which raise a reasonable doubt as to whether the defendant was in fact the person who committed the crime described, then you should find the defendant not guilty.
>
> There has been testimony to the effect that the defendant Johnson was not present at the time and the place when this offense was committed. This is a so-called alibi defense. The defense of alibi is a legitimate, legal and proper defense. The evidence adduced in support of this defense, like all the other evidence in the case, should be given such weight and such consideration as you may think it is entitled to under all the facts and circumstances.

> If after a full and fair consideration of all the facts and circumstances in evidence you find the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time and place of the commission of the offense charged in the indictment, then one of the essential elements of the offense is lacking and it will be your duty to find the defendant not guilty." (Tr. 665-667).

After the trial judge delivered this instruction, defense counsel asked him to instruct the jury to consider the age, intelligence and ability to observe of the one identification witness, along with the fact that none of the other persons in the liquor store could identify appellant.[17] (Tr. 678-679). The judge refused, stating that "these are all matters for the jury." (Tr. 679).

The refusal to detail factors bearing on the accuracy of Boydston's identification was well within the trial judge's discretion. The instructions quoted above fully meet the standards set down by this Court in *Jones* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 537 (1966).[18] The trial judge framed the instructions with reference to the contentions made on behalf of appellant; pointed out that the evidence raised a question as to whether appellant participated in the crime and that the jury had to resolve the conflict in testimony on this issue; and stressed that the prosecution's burden to prove every element of the crime beyond a reasonable doubt

---

[17] Before the judge put together and delivered his charge, defense counsel sought no special instructions on the issue of identification (Tr. 648-649).

[18] The Court distinguished *Salley* v. *United States*, 122 U.S. App. D.C. 359, 353 F.2d 897 (1965), relied upon by appellant, as addressed only to the "troublesome and recurring question of identification in a Narcotics Act prosecution initiated many months after a purchase made by an undercover narcotics agent as one in a long series of non-related transactions". Two of the other cases c'ted by appellant, *Levine* v. *United States*, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958), and *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951), are inapplicable since they involved failure to mention certain issues raised by the evidence.

included the task of proving the identity of appellant as a perpetrator of the crime. Having instructed the jury that they were the sole judges of credibility, it was not reversible error for the judge to fail to expand upon the criteria by which credibility should be weighed, *Ballard* v. *United States*, 99 U.S. App. D.C. 101, 237 F.2d 582 (1956), especially since these points were covered extensively in cross-examination and summation. *United States* v. *DeSisto*, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

To the extent that defense counsel wanted the evidence summarized, the judge's refusal was even more clearly a proper exercise of discretion. *Quercia* v. *United States*, 289 U.S. 466 (1933); *United States* v. *Cohen*, 145 F.2d 82, 92 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945). Federal trial judges have no duty to marshal "evidence for and against the accused for the benefit of the jury." *United States* v. *Simmons*, 281 F.2d 354, 359 (2d Cir. 1960) (*en banc*); *United States* v. *Owens*, 263 F.2d 720 (2d Cir. 1959). By such a practice the judge runs the risk of giving undue emphasis to certain facts, and thereby creating reversible error. *Jones* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 537, 540 (1966). See *e.g.*, *Cooper* v. *United States*, —— U.S. App. D.C. ——, 357 F.2d 274 (1966).

Moreover, the instructions must be reviewed "in the setting created by the jury's hearing of the evidence and summations of counsel." *United States* v. *Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). Defense counsel thoroughly cross-examined Boydston as to whether he had an opportunity to see the hold-up men clearly. Through his other witnesses, counsel showed that Boydston had previously indicated uncertainty about his identification of appellant. In his closing argument, counsel stressed the fact that Boydston's identification constituted the only evidence against appellant, and reiterated the elements which casted doubt upon the reliability of this identification, as well as the

Boydston's credibility.[19] (Tr. A50-52, 55-59). Since the issue was so fully covered in the course of trial, it cannot seriously be suggested that the instructions left the jury unaware that they had to be convinced beyond a reasonable doubt by the identification which placed Johnson at the liquor store. See *Smith* v. *United States*, —— U.S. App. D.C. ——, 336 F.2d 941 (1964) (per curiam).

Appellee thus asserts that the instructions dealing with identification were entirely sufficient. And due to the speculative nature of the prejudice alleged by appellant, neither can reversal be pegged upon the portion of the charge dealing with joint participation.

V. The testimony with respect to the events of December 19th was properly limited to the issue of credibilty.

(Tr. 49-50, 442, 535-538, 634, 660-661)

Appellant's contention that the trial court erred by permitting any mention of the events preceding the line-up on December 19, 1964, does not withstand analysis in terms of the limited purposes for which this evidence was introduced. The prosecutor initially brought out the manner of appellant's arrest in order to lay a foundation for linking co-defendant Jones with the attempted robbery. Other evidence showed that bullets fired from a gun surrendered by Jones upon arrest matched two slugs which were found in the liquor store. The narrative by Officer Thomas was necessary to forestall any attempt to exclude this evidence as the product of an illegal search and seizure.[20] The theory by which the prosecutor sought

---

[19] He pointed out, *inter alia*, that Boydston could not describe his assailant at trial, caught merely a "fleeting glimpse" of this man, only made a positive identification after being coached by the prosecutor, and could not remember inconsistent statements which he allegedly gave to defense investigators.

[20] A pre-trial motion to suppress the evidence had been made, and objections to its admission were raised at trial. (Tr. 49-50, 442).

Appellant mentions that the sawed-off shotgun and pistols seized on December 19th were kept on the counsel table during at least some of the trial. But his attorney voiced no objection to them staying there. At one point, counsel for co-defendant Jones asked that the

to prove that Jones had participated in the attempted robbery therefore involved recitation of the circumstances surrounding appellant's arrest.

The cases are legion that "evidence which may incidentally show arrest, incarceration or conviction for some other offense" may be admitted if it tends to prove "some material fact or aspect of the prosecution's case." *Hardy* v. *United States*, 199 F.2d 704 (8th Cir. 1953) (evidence used to establish that endorsements upon stolen checks had been made by accused). See *United States* v. *Kiamie*, 258 F.2d 924 (2d Cir.), *cert. denied*, 358 U.S. 909 (1958); *O'Dell* v. *United States*, 251 F.2d 704 (10th Cir. 1958). And the "trial judge must have wide discretion to determine whether the probative value of the evidence is outweighed by its prejudicial character. McCormick, Evidence, § 157 at 332 (1954)." *United States* v. *Montalvo*, 271 F.2d 922 (2d Cir. 1959). The fact that Jones had a gun previously used in the attempted robbery was directly relevant to the crime charged in the indictment; evidence showing the gun's lawful seizure was not rendered inadmissible simply because it also indicated that Jones and appellant had committed an unrelated offense. See *Duncan* v. *United States*, 357 F.2d 195, 197 (5th Cir. 1966); *Babb* v. *United States*, 351 F.2d 863, 867 (8th Cir. 1965); *Schwartz* v. *United States*, 160 F.2d 718 (9th Cir. 1947); *Crapo* v. *United States*, 100 F.2d 996 (10th Cir. 1939).

After co-defendant Jones obtained a directed verdict of acquittal, Officer Thomas' testimony remained relevant insofar as it affected appellant's credibility. By taking the stand and denying that he was present at the scene

---

weapons be removed, but the judge expressed reluctance to interfere with the conduct of the prosecution's case until fuller development of the evidence. (Tr. 443). This request was never renewed, and the record does not reveal whether the weapons were again placed on the counsel table in subsequent sessions. The prosecutor only introduced into evidence the revolvers (and related ammunition) found upon Gatlin and Jones. The judge's charge withdrew the latter gun from the jury's consideration since Jones had been acquitted. (Tr. 661).

of the crime, appellant put his credibility in issue. The prosecutor therefore had the right to impeach him through cross-examination about the events of December 19th. See *Dowling Bros. Distilling Co.* v. *United States*, 153 F.2d 353 (6th Cir), *cert. denied*, 328 U.S. 848 (1946). These questions were obviously not designed to impress the jury with appellant's contemporaneous misdeeds since the prosecutor carefully avoided mentioning anything which would suggest that appellant had been carrying a weapon or had committed another offense on that date (Tr. 537). Cross-examination, though, uncovered several discrepancies between the accounts given by appellant and Officer Thomas. For instance, appellant denied seeing Hargroves hide the .38 caliber revolver, Officer Thomas take the gun from under the seat, or anyone run away from the car when it stopped at the precinct. (Tr. 535-536, 538). Appellee submits that testing appellant's credibility in this manner was completely justified.[21] The trial court's instructions to the jury stressed that the testimony relating to the events of December 19th could only be considered for the limited purpose of weighing credibility.[22] These cautionary instructions ef-

---

[21] Both defense counsel and the trial judge adverted to the matter of credibility at length. As the judge noted, the question of guilt or innocence rested entirely on credibility, that is, whether the jury would accept appellant's story or Boydston's identification. (Tr. 634.)

[22] This portion of the charge reads as follows:

> The only issue in this case is whether the two defendants, Gatlin and Johnson, or either of them, committed the offenses which are charged in the indictment and everything except the question as to whether a defendant or the defendants committed the offenses charged is extraneous and should be ignored and disregarded.
>
> For example, there was evidence of an occurrence on December 19th involving the arrest of one Hargroves for a traffic violation in the presence of Johnson and Jones, who as you know is no longer involved in this case, and the seizure of a weapon from Jones which was later proved to have been used in the robbery. Since Jones is no longer involved in the case and, accordingly, since his gun is no longer in evidence,

fectively blunted any possible prejudice. See *Jones* v. *United States*, 251 F.2d 288 (10th Cir.), *cert. denied*, 356 U.S. 919 (1958).

Viewed against the circumstances as they developed at trial, the judge's rulings on this issue did not constitute an abuse of discretion.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

LEE A. FREEMAN, JR.,
Special Assistant United States Attorney.

---

the events of December 19th must be considered as extraneous and not having any bearing on the guilt or innocence of these defendants as to the crimes charged to have been committed on December 7th. The December 19th occurrence has no bearing on the guilt or innocence as to the crime charged on December 7th. However, there were attempts to impeach the credibility of certain witnesses by reference to the events of December 19th. For the limited purpose of considering this question of credibility, you may consider those events. (Tr. 660-661).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 241753 484

BRIEF FOR APPELLANT

Robinson

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,780

F 422

JOHN A. JOHNSON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District Court
for the District of Columbia

DAVID COBB

Attorney for Appellant
(Appointed by the Court)
1908 Q Street, N. W.
Washington, D. C. 20009
DUpont 7-5424

October 28, 1966

STATEMENT OF QUESTIONS PRESENTED

1. Whether, after the government's case against appellant was complete and appellant in its custody, a prejudicial purposeful and unnecessary delay of 107 days before filing a charge deprived appellant of due process, or a speedy trial, or constituted cause to dismiss the indictment under Rule 48(b).

2. Whether, when identification of appellant depended on one witness, whose testimony was disputed, the Court erred (a) by denying a view of the Grand Jury testimony of the identifying witness, (b) by allowing leading questions on redirect examination of the identifying witness, (c) by failing adequately to instruct the jury on identification, (d) by communicating privately with the jury after lock-up, and (e) by, in the charge to the jury, joining the verdicts on appellant and a co-defendant whose identification was not disputed.

3. Whether, when the case against appellant was paper thin, the Court erred by allowing the prosecutor to show appellant's commission of an unrelated offense.

INDEX

TABLE OF AUTHORITIES

CASES CITED — Page

---

*Authorities chiefly relied upon are marked by asterisks.

*Authorities chiefly relied upon are marked by asterisks.

---

*Authorities chiefly relied upon are marked by asterisks.

---

*Authorities chiefly relied upon are marked by asterisks.

STATUTES AND RULES CITED

TREATISE

---

*Authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,780

John A. Johnson,

Appellant,

v.

United States of America,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was convicted by jury trial in the United States District Court for the District of Columbia on four counts of assault committed in an attempted robbery in the District of Columbia. He appeals here. This Court has jurisdiction by virtue of Title 28 U.S.C. §1291.

STATEMENT OF THE CASE

On December 7, 1964, at seven in the evening police officers Kaclick and Blake were on stake out duty in the Big "D" Liquor Store at 4173 Minnesota Avenue, N. E. Tr. 125-126, 245. Both were in a store room at the rear of the store. Tr. 127. Officer Kaclick was watching the counter

and store entrance through a peep hole in the store room door. Tr. 127-128. Four men rushed in, one armed with a sawed-off shotgun, three with pistols. Tr. 128-131, 231, 238-239. One of the three with pistols was Reginald Gatlin, a co-defendant in the trial below. Tr. 134.

Two store employees were in the store; no one else. Tr. 141, 246. Leon Berez, behind the counter near the cash register, was at once confronted by the man with the shotgun and told to "open the register and lay down". Tr. 231. He did. Clyde Boydston, the other employee, was in the walk-in freezer at the rear of the store, the freezer door open. Tr. 287, 314. At the commotion he turned, saw over his shoulder the man confronting Berez, when another man stuck a pistol in his face and told him to lie down. Tr. 286-289, 314-315. He did. He stayed on the floor until after the shooting was over.

Gatlin, pistol in hand, went directly to the store room door behind which Officer Kaclick was crouching, pushed back the door, and was struck almost at once by fire from the revolver of one of the officers. Gatlin fell. Tr. 129-131, 246-247. Lots of shots followed. Tr. 131-133, 247, 250-251. The man with the shotgun fired at least one blast. Tr. 251, 131. Except for Gatlin, the men with pistols fired several shots. Both Officer Blake, twice, and Officer Kaclick, three times, fired at the man who had accosted Mr. Boydston.

Tr. 130, 247. Officer Kaclick saw this man run past the now open store room door, join one of the others, and run out the front entrance. Tr. 130. Despite all the fire, three men escaped. Gatlin alone was hit.

All this action took only split seconds of time. Tr. 324. None of the four witnesses observed any unusual feature to distinguish any of the escaped men. Def. Exhibits 4, 5, 6. In one important respect, their observations differed. Officer Kaclick testified that he thought the man who accosted Mr. Boydston wore a stocking mask pulled over his face. Tr. 147-148. The police reports made December 7 and the following day described this man wearing a stocking mask pulled over his face. Tr. 150, Def. Exhibits 4, 5, 6. At the trial Officer Blake and Mr. Boydston testified that this man had no mask. Tr. 248, 288.

Twelve days later, on December 19, 1964, at 9:40 A. M. Officer Thomas, walking the 1400 block of H Street, N. E., arrested one Hargroves for a traffic violation. Tr. 38-39. At the time of the arrest there were four persons in the car with Hargroves, one the appellant. Tr. 39. The appellant offered to drive the car to No. 9 precinct. Officer Thomas approved and appellant took Hargroves' place at the wheel. Tr. 40. One rider at this point left. The others with the officer arrived together in the car at No. 9 precinct. Tr. 40, 42.

When there, Officer Thomas reached under the front seat of the car and removed a loaded .38 caliber pistol which he thought he had earlier observed Hargroves slip under the seat. Tr. 39, 42. At this point a second occupant of the car "broke and ran". Tr. 45-46.

Officer Thomas then requested Hargroves to open the trunk of the car. Tr. 46. When opened, Officer Thomas spotted a sawed-off shotgun partly wrapped in a towel. Tr. 46. Hargroves stated the shotgun belonged to him. Tr. 46. Next Officer Thomas told Hargroves to walk in front of him and they went into the precinct station. Tr. 46. Appellant and the one other remaining car occupant, Jones, co-defendant in the trial below, went with Officer Thomas and Hargroves into the station. Tr. 80.

Officer Thomas testified that after appellant and Jones had come into the precinct station, he noticed a bulge in appellant's right pants pocket. Tr. 47. He asked appellant if he had a gun. Tr. 47. Appellant said he did and Officer Thomas removed from appellant's pocket a .22 caliber pistol. Tr. 47. Officer Thomas testified that he next asked Jones if he had a gun. Tr. 47. Jones said he did and Jones took from his coat pocket a .32 caliber pistol. Tr. 47. Each had rounds in his pocket. Tr. 47. Appellant and Jones were arrested and each charged with carrying a dangerous weapon. Tr. 47. Appellant has been incarcerated ever since.

Later that same morning Jones, Hargroves, Officer Thomas and appellant were placed in a four man line-up. Tr. 601-602, 613.

The first person to view the line-up was Mr. Boydston. Tr. 603. What exactly happened is the subject of conflicting evidence. Mr. Boydston is shown to have made either a positive identification that appellant was the man who on December 7 put the gun in his face, Tr. 311-312, 359, 603-605, 622, or to have stated that appellant might be that man, Tr. 525, or reminded him more of that man than did the other three "but that he could not positively identify him." Tr. 583-584. Officers Kaclick and Blake and Mr. Berez have at no time identified the appellant, Jones or Hargroves with the December 7 assaults.

On January 15, 1965, the weapons taken on Decmeber 19 and bullets picket up at the Big "D" Liquor Store were submitted to the FBI for ballistic comparison. Tr. 397-398. The ballistic report was submitted to the Metropolitan Police Department January 29, 1965. Tr. 400. Two bullets from the scene were identified as fired from the revolver Officer Thomas took from Jones. Tr. 400. No identification was made of the weapon taken from appellant or from Hargroves. Tr. 433-434. No identification could be made of the shotgun. Tr. 397.

On April 5, 1965, the government filed an indictment against Gatlin, Jones and appellant. The first four counts, each against all three defendants, were counts of assault on December 7. Counts five and six were respectively counts against appellant and Jones for carrying a dangerous weapon on December 19. The service of this indictment upon the appellant

on April 7, 1965, was the first notice to appellant that the government charged him with the December 7 assaults.

After the indictment and before trial, appellant made a number of motions; among others, on May 7 to suppress evidence on the ground of unlawful arrest, on June 18 to sever offenses and defendants on the ground of prejudice, on July 9 to view portions of the Grand Jury testimony, on August 12 to dismiss for lack of speedy trial. Except the motion to sever, these motions were denied.

The Court allowed on June 18, 1965, the motion to sever counts five and six from counts one through four. Appellant contended that showing the separate December 19 offnese would prejudice the jury in its consideration of the evidence connecting him with the December 7 assaults. Counts five and six were set for separate trial on July 1, 1965. On July 1, preliminary to trial, the Court dismissed these counts for lack of a speedy trial.

The instant trial with Gatlin, Jones[1/] and appellant as defendants commenced on August 24, 1965. Before the opening statements defendants' counsels requested the Court to

---

1/ Defendant Jones was connected with the assaults only by the ballistic report. The Court dismissed the charges against Jones holding the evidence too speculative to go to the jury. Tr. 460.

direct the government not to show appellant's offense and arrest on December 19 nor the shotgun taken by the police on Decmeber 19. Tr. 13-14, 18, 24-28, 32-34. The Court rejected these requests and let the prosecutor try his case his own way. Tr. 23, 34.

The prosecutor included in his opening a full recital of the events of December 19. Tr. Vol. A, 5-9. Officer Thomas was the government's first witness. Tr. 37. Over appellant's objections, he told the entire story of the December 19 arrests, commencing with the traffic violation by Hargroves and concluding with the arrests of appellant and Jones and the subsequent search of the suspect car. Tr. 37-48. When this testimony was completed, the government had identified and spread out on counsel's table the sawed-off shotgun, the three pistols, and the shotgun ammunition and slugs which Officer Thomas had seized on December 19. Tr. 42, 48, 50 and 52, Government Exhibits 1-A, 1-B, 2-A, 2-B, 3-A, 3-B, 4-A, 4-B. These stayed on display throughout the government's case. Tr. 434.

The only evidence identifying appellant with the attempted robbery was Mr. Boydston's identification. Tr. 373. Mr. Boydston testified repeatedly that he was positive that appellant was the man who accosted him. Tr. 311-312, 325, 333, 359. He testified that he was positive when he viewed the line-up on December 19, was positive at a confrontation immediately following the line-up, and was positive at trial and at all times throughout the nine months before trial.

The testimony of four other witnesses, including two police officers, evidenced that Mr. Boydston had expressed on not less than five separate occasions from early May to August unmistakeable uncertainty regarding his identification of appellant. Tr. 316-318, 513-515, 583-585, 605-608, 623-625. It was shown that shortly before trial the government had to refresh Mr. Boydston's recollection of the identification he made at the December 19 line-up. Tr. 605-608, 623-625. On this occasion the line-up Officer Noone used his line-up notes to refresh Mr. Boydston's recollection. Also present at this pretrial conference were Officers Blake and McElvane. Tr. 624. Officer Blake testified that on December 19 Mr. Boydston, just after viewing the line-up, told him "he didn't want to see an innocent man go to jail but he was positive x x x". Tr. 621-622. Officer McElvane testified that at the confrontation which followed the line-up, Mr. Boydston identified appellant. Tr. 619-620. Officer McElvane shed no light on whether Mr. Boydston was on December 19 certain or uncertain.

Once or twice before trial the District Attorney told Mr. Boydston that the government wanted a positive identification. Tr. 337. It was shown that on at least one such occasion Mr. Boydston had told the District Attorney that he didn't want "to see an innocent man go to jail". Tr. 338. In reply, the District Attorney had instructed Mr. Boydston that if he took the stand, the identification will have to be "a positive identification". Tr. 358, 624.

Mr. Boydston on April 5 testified before the Grand Jury which brought down the indictment. Tr. 328, 345-347. Appellant made a number of motions at trial seeking access to Mr. Boydston's Grand Jury testimony. Tr. 355-356, 372. These motions were denied. Tr. 382-383. Appellant objected to allowing leading questions to Mr. Boydston on redirect examination. Tr. 356. This objection was denied. Tr. 356-360. Appellant sought special instruction to the jury on evaluating Mr. Boydston's testimony. Tr. 678-679. No special instruction was given. Tr. 665-667, 679.

The jury during its deliberations transmitted a note to the Court asking whether Officer Kaclick had testified that he exchanged shots with Mr. Boydston's assailant. Tr. 682. The Court, in private without consulting counsel, responded by telling the jury it must rely on its own recollection. Tr. 682.

Appellant attempted to establish an alibi. Appellant testified, his girl friend testified and a neighbor of the girl friend testified. Tr. 517-523, 555-558, 570-573. All three testified that appellant was with his girl friend in her apartment on the evening of December 7. The testimony of all three to date the evening described was inconclusive. Tr. 531-532, 561, 563-567, 577-578.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment V.

"No person shall x x x be deprived of x x x liberty x x x without due process of law x x x."

United States Consitution, Amendment VI.

"In all criminal prosecutions the accused shall enjoy the right to a speedy x x x trial x x x."

Federal Rules of Criminal Procedure, Rule 48(b).

"(b) If there is unnecessary delay in presenting the charge to a Grand Jury x x.x the court may dismiss the indictment x x x."

STATEMENT OF POINTS

(The portions of the transcript which appellant desires the Court to read on each point are shown following its statement.)

1. The Court erred by failing to dismiss the charges for lack of due process and a speedy trial under the Fifth and Sixth Amendments of the Constitution. With appellant in its custody and after its case against appellant was complete, the government delayed 107 days before presenting charges to appellant. The delay was purposeful, unnecessary, and undertaken when prejudice to appellant's defense was foreseeable. The delay prejudiced appellant's defense against the government's case for identification and prejudiced appellant's case for an alibi. Because the case against appellant was paper thin, the prejudice done by the delay was substantial. Tr. 47, 51,

125-130, 146-147, 150, 155, 217, 219-221, 244-248, 250, 252, 254, 260, 275, 285, 286-289, 308-309, 311-327, 331-338, 342, 356-360, 373, 395-397, 433-434, 475-477, 482, 484-485, 488, 509-525, 530-567, 569-573, 575-585, 601-613, 616, 618-626, Vol. A., 27-30, Government's Exhibit 9, Defendant's Exhibits 4, 5, 6.

2. The Court erred by failing to dismiss the charges for unnecessary delay under Rule 48(b) of the Federal Rules of Criminal Procedure. The reasons are the same as stated in support of Point 1.

3. The Court erred by denying appellant access to the Grand Jury testimony of the identifying witness. The identifying witness was the key witness against appellant. At the trial the witness could no longer testify on personal recollection alone so that there was need for his fresher testimony before the Grand Jury. Inconsistencies appeared in his testimony. His testimony was contradicted by other witnesses and his credibility was in issue. Tr. 373, 382-383; Boydston: Tr. 286-289, 308-309, 311-327, 331-338, 342, 356-360; Officer Kaclick: Tr. 125-130, 146-147, 150, 155, 217, 219-221; Officer Blake: Tr. 244-248, 250, 252, 254, 260, 275, 285, 621-626; Gatlin: Tr. 475-477, 482, 484-485, 488, 509-511; Aaronson: Tr. 512-515; Appellant: Tr. 524-525; Reed: Tr. 579-585; Officer Noone: Tr. 601-613, 616; Officer McElvane: 618-620.

4. The Court erred by allowing leading questions on redirect examination of the identifying witness. The testimony which resulted prejudiced the trial and did clear injustice to appellant. Boydston redirect examination at Tr. 356-360. Also testimony cited for Point 3 above.

5. The Court erred by failing to give specialized instructions on the issue of identification. Because this was the only real issue, the jury's attention should have been focused on this issue and particularized instructions given to assist the jury to evaluate fairly the case for identification. Tr. 665-666, 678-679. Also testimony cited for Point 3 above.

6. The Court erred by communicating privately with the jury after lock-up. The Court's reply to the jury's "inquiry" prejudiced appellant and invalidated the verdict. Tr. 682. Also testimony of Officer Kaclick cited for Point 3 above.

7. The Court erred in its charge to the jury by joining the verdicts against the appellant and a co-defendant. Appellant was prejudiced because the case for identification against appellant was weak, against the co-defendant strong. Tr. 667-668, 475-477.

8. The Court erred by admitting evidence of an unrelated offense. This evidence showed a propensity to crime, constituted an attack on the character of appellant, and stimulated speculations not suited to jury consideration. It was grossly

prejudicial to a fair trial and served no legitimate purpose. Tr. 19-28, 460, 471; Officer Thomas: Tr. 37-52, 98-99. Government's closing argument: Tr. Vol. A 19-20. See also testimony cited for Point 1 above.

SUMMARY OF ARGUMENT

The government's delay in filing charges against appellant after its case was complete and appellant in its custody on a separate offense violated constitutional rights to due process and a speedy trial. The only real issue was appellant's identification. The only identifying evidence was the testimony of one witness who identified appellant at a police line-up twelve days after the offense. At the same time two police officers who had had as good, if not better, opportunity to observe the offense did not identify appellant. In these circumstances the risk that an innocent man might go to jail was plainly foreseeable. Any extended delay in presenting the charge to appellant would make impossible a timely investigation of the identification made at the police line-up and might make difficult the establishment of an alibi. Accordingly, any purposeful delay in presenting the charge to appellant should have reflected an accommodation of fairness and efficiency. Instead, the delay which ensued was not necessary to efficiency, was part of a planned prosecution of the appellant pursued without regard for a fair trial, and lasted 107 days. It resulted in the sole identifying witness being no longer able to testify at

trial on his personal recollection alone. Before trial his recollection had been of necessity refreshed by use of police line-up notes. The uncertainties which may have qualified his identification at the police line-up were at trial lost to memory without means for recall. The delay also resulted in inability to establish convincingly the appellant's alibi. Because of the thinness of the case against appellant, the prejudice done was substantial and irreparable. Accordingly the charges must be dismissed by reason of the Fifth and Sixth Amendments, or, alternatively, should be dismissed under Rule 48(b) of the Federal Rules of Criminal Procedure.

A number of trial errors were made, each of which prejudiced appellant's right to obtain from the jury a fair evaluation of the testimony of the identifying witness. (1) The Court erred by denying a view of the Grand Jury testimony of the identifying witness. The testimony of this witness at trial contained inconsistencies, was disputed by other witnesses and had been before trial "refreshed" so that the earlier testimony given before the Grand Jury was essential to seeking out the truth. (2) The Court erred by allowing the prosecutor to lead the identifying witness throughout redirect examination. This resulted in reaffirmation of a positive identification when it had appeared in cross examination that the witness may have had uncertainties at the line-up which had since been lost to memory or otherwise submerged. (3) With the one real issue being identification, the Court erred by denying a request for

particularized instructions on identification. The standard instruction which was used was insufficient because the identifying witness made his observations under most difficult circumstances and testified under instructions whereby his identification, if given at all, was to be a positive one. (4) The Court erred by privately answering an inquiry from the jury after lock-up in a manner which handicapped the jury's evaluation of the identification. (5) The Court erred in its charge to the jury by tying the verdict of appellant to that of a co-defendant whose identification with the assaults was not disputed.

The trial of the charges against the appellant was further prejudiced by showing an unrelated offense. Appellant's arrest on December 19, twelve days after the assaults, carrying a dangerous weapon and in company with other armed persons and riding in a car from which the police took a sawed-off shotgun, were events not related to the charged assaults. These events evidenced a propensity for crime, bad character, and afforded grounds for speculation that the shotgun and the companions of December 19 were participants in the attempted robbery twelve days earlier. This evidence was not admissible under any recognized exception to the exclusionary rule. It served no legitimate purpose at the trial. By reason of the thinness of the government's case, the introduction of this evidence substantially prejudiced the trial.

The trial errors taken together, if not singly, make necessary a new trial.

ARGUMENT

I.

THE DELAY

A. The Charges Must Be Dismissed For Lack Of Due Process And A Speedy Trial.

Purposeful, unnecessary and prejudicial delay in the prosecution of an offense, even if the delay occurs before any charge is made and within the period of statutory limitation, may constitute a breach of Fifth Amendment due process or of the Sixth Amendment right to a speedy trial. United States v. Provoo, 350 U. S. 857, 76 S. Ct. 101, 100 L. Ed. 761 (1955), affirming Petition of Provoo, D. Md., 17 F. R. D. 183; Pollard v. United States, 352 U. S. 354, 361, 77 S. Ct. 481, 1 L. Ed. 2d 393 (1957); Mann v. United States, 113 App. D. C. 27, 304 F. 2d 394 (1962); Powell v. United States, ___ App. D. C. _____, 352 F. 2d 705 (1965). See also Nickens v. United States, 116 App. D. C. 338, 323 F. 2d 808 (1963), cert. denied 379 U. S. 905, 85 S. Ct. 198, 13 L. Ed. 2d 178.

Appellant was tried for assaults committed on December 7, 1964. Twelve days later, on December 19, appellant was arrested and identified in a police line-up. This identification, made on December 19, is the entire case against appellant. The government, however, did not file its charge against appellant

until April 7, 1965, 119 days after the offense, 107 days after appellant was identified and placed in custody.

The propriety of this delay cannot be measured in days alone. 2/ Hedgepeth v. United States, ___ App. D. C. ___, No. 19,509 decided June 30, 1966; Taylor v. United States, 98 App. D. C. 183, 238 F. 2d 259 (1956). The burden is on the appellant to show that this delay was purposeful, unnecessary and prejudicial to a fair trial of the charges against him. Powell v. United States, ___ App. D. C. ____, 352 F. 2d 705, 708 (1965). But see: Jackson v. United States, ___ App. D. C. ___, 351 F. 2d 821, 823 (1965).

(1) The delay was prejudicial.

Appellant's conviction must rest on Mr. Boydston's identification. There is no other evidence to identify appellant with the December 7 assaults. Accordingly the fairness of the trial of the charges against appellant depends

---

2/ "x x x The issue here is not about the outer limits of a time period in which a prosecution may be initiated but about the problem of to what extent and under what circumstances the police may delay making an arrest [in this case the government may delay filing an indictment] once they have sufficient knowledge of a crime to support the arrest x x x [in this case indictment]." Words in brackets added. Powell v. United States, ___ App. D. C. ____, 352 F. 2d 705, 707-708 (1965).

on the opportunity given to the jury to evaluate fairly the identification made by Mr. Boydston.[3/]

The government contended that Mr. Boydston on December 19 made a positive identification of appellant. Mr. Boydston so testified. Tr. 311-312, 325-326, 333, 359-360. Mr. Boydston, however, did not testify on the basis of his personal recollection alone. Shortly prior to trial, his recollection had been refreshed on the basis of the line-up notes and recollection of the line-up Officer Noone. Tr. 606-608, 624-625. The notes in themselves did not contain an express record of a positive identification. Tr. 610, 612, 330, Government Exhibit 9. The notes were in a form useful only to refresh Officer Noone's recollection and to recall to him that Mr. Boydston did make a positive identification.

Officer Noone and Officer Blake testified that Mr. Boydston on December 19 made a positive identification. Tr. 603-605, 622. Officer Noone's testimony was shown not to be based on his personal recollection alone. Prior to trial his recollection

---

3/ Mr. Boydston's ability to identify appellant in the courtroom is proof only that he could point out the individual whom he earlier identified at the police line-up. Mr. Boydston's opportunity to become familiar with appellant's appearance at the police line-up, and at the confrontation which followed, is not in issue. The critical issue turns upon the significance to be given to Mr. Boydston's identification of the appellant on December 19--not upon his ability to point out later the man he identified on December 19.

had been refreshed by his line-up notes. Tr. 614-615. Officer Blake was present at the pretrial conference when Officer Noone's notes and recollection were used to refresh Mr. Boydston's recollection. Tr. 624-625. The record fails to show to what extent Officer Blake might have recalled the December 19 identification made by Mr. Boydston had it not been for Officer Noone's line-up notes and recollection.

Officer McElvane testified that Mr. Boydston identified the appellant at a confrontation which took place immediately following the line-up. Tr. 619-620. Officer McElvane's testimony, however, sheds no light on the extent to which Mr. Boydston's identification at the confrontation was positive or may have been uncertain.

The possibility that Mr. Boydston's testimony and the testimony of Officers Noone and Blake reported mistaken recollections is very real. The government on December 19 did not charge appellant with the December 7 assaults. According to Officer Blake Mr. Boydston did on that day express concern that an innocent man might go to jail. Tr. 622. Mr. Boydston obtained only a brief glance at his assailant. Tr. 324, 581. His assailant may have worn a mask. Although Mr. Boydston did testify before the Grand Jury on April 5, the prosecutor when it became necessary to recall to Mr. Boydston's mind the identification he had made on December 19, did not use for this purpose Mr. Boydston's testimony before the Grand Jury. Commencing in May, shortly after Mr. Boydston's appearance

before the Grand Jury, and continuing to just before the commencement of trial in August, Mr. Boydston at a series of meetings with appellant's counsel, with counsel for co-defendant Jones, with the Legal Aid investigator Reed and with the prosecutor and police officers expressed uncertainty in varying degrees to his past and present ability to identify his assailant. Tr. 316-317, 513-515, 581-585, 605-608, 622-625. Mr. Boydston had been instructed that the prosecutor wanted a positive identification. Tr. 337-338, 358, 623. Mr. Boydston at no time could put into words any feature of the appellant that caused him to be positive of his identification. Tr. 321. All these circumstances compel the conclusion that had Mr. Boydston been interviewed by appellant's counsel at a time when Mr. Boydston retained a personal recollection of the December 19 line-up, counsel would have been able to recall to Mr. Boydston's mind uncertainties which he had experienced on December 19 and which were not recalled to Mr. Boydston's mind by Officer Noone.

However, it is not necessary that appellant show that the testimony of Mr. Boydston would have been different had appellant's counsel had opportunity to question Mr. Boydston earlier. It is sufficient to show that Mr. Boydston's identification rested upon a recollection, which by reason of the delay had to be refreshed by means weighted in favor of the prosectuion. The likelihood that Officer Noone's handwritten

notes and the officer's recollection of the line-up would recall to Mr. Boydston's mind uncertainties which he may have had on December 19 was remote. A fair trial of the case for identification required that, within the span of Mr. Boydston's personal recollection of the line-up, someone acting for the appellant explore and make a record of the uncertainties which Mr. Boydston may have had on December 19. This timely exploration was prevented by the delay in presenting the charges.

Besides prejudicing a fair trial of the government's case for identification, the delay in presenting the charges to appellant prejudiced appellant's case for an alibi. Appellant attempted to show that on the evening of December 7 he was at the apartment of his girl friend and that a neighbor visited with them in the parartment that evening. Tr. 520-522, 555-557, 570-573. The evidence does establish that the appellant ordinarily spent several evenings a week in the apartment of his girl friend. Tr. 532, 554,570, 575. However, neither appellant nor the girl friend nor the neighbor convincingly established that the evening to which they made reference in their testimony was the evening of December 7. Tr. 531-532, 561, 564-565, 576-578. Presumably had appellant's counsel been able on December 19 or shortly thereafter to investigate appellant's whereabouts on the evening of December 7, the testimony available for the jury would either have been sufficient to establish the date of the evening described, or it may be that such investigation would have resulted in the presentation

of quite different testimony in appellant's behalf. As the prosecutor pointed out in closing, it was difficult to know in mid-April, 1965, precisely where appellant was at seven o'clock on the evening of December 7, 1964. Tr. Vol. A, 27-29.

The prejudice done by the delay to an evaluation of Mr. Boydston's identification and to the appellant's case for an alibi substantially prejudiced a fair trial because the entire case against appellant was paper thin. Not only did the case for identification depend solely on the December 19 identification made by Mr. Boydston, but also the two police officers, Blake and Kaclick, who had as good if not better opportunity to observe Mr. Boydston's assailant, did not identify appellant as the assailant. According to police reports made December 7 and 8, and Officer Kaclick's observation, Mr. Boydston's assailant wore a stocking mask over his face. Government's Exhibits 4, 5, and 6. Tr. 142, 146-147, 150, 248. The only gun which the government ever identified with the appellant was a .22 caliber pistol not nickel-plated while the revolver carried by the man who accosted Mr. Boydston was shown to have been nickel-plated and .32 caliber. Tr. 47, 221, Defendant's Exhibits 4 and 6. Taylor v. United States, 98 App. D. C. 183, 238 F. 2d 259 (1956).

(2) The delay was purposeful.

During the delay, the government obtained a waiver to the Grand Jury of the preliminary hearing on the December 19 CDW charge. It prepared to present both the CDW charge and

the December 7 assault charges in a single indictment. It prepared also to join in the single indictment charges against appellant, Gatlin and Jones. There is no evidence of any mistake, oversight or accident. On the contrary, the evidence discloses a series of stratagems each directed toward conviction of the appellant, and each taken before the charges against him were filed. The only reasonable conclusion is that the delay was purposeful, was part of the planned prosecution of appellant, and was for the convenience of the government. "x x x being purposeful, the delay should result only from arrangements which reflect a conscious effort to accommodate fairness and efficiency." Ross v. United States, 121 App. D. C. 233, 349 F. 2d 210, 213, footnote 2 (1965).

(3) The delay was unnecessary.

On December 19 the government did charge appellant with carrying a dangerous weapon. On the same day, or shortly thereafter, it could have charged appellant with the assaults of December 7. This should have been done if Mr. Boydston did in fact make a positive identification on December 19. The government's case against appellant was then at that time complete and appellant in its custody. If instead the case for identification on December 19 was uncertain, then the trial has shown that the government did not thereafter obtain any additional evidence to improve its case, and the case was at no time sufficient to go to a jury.

(4) Conclusion.

In narcotics cases, this Court has frequently examined the prejudice caused by delay in the presentment of a charge. In two respects this case is similar to the narcotics cases. In this case, as in the narcotics cases, the critical evidence lies within police domain. Also in this case, as in the narcotics cases, the critical testimony is given by witnesses who must rely for the refreshment of their recollections upon the notations of the police officer who conducted the inquiry. However, in this case, unlike the narcotics cases, there was no need for the government's delay. Ross v. United States, 121 App. D. C. 233, 349 F. 2d 210 (1965); Powell v. United States, ____ App. D. C. ____, 352 F. 2d 705 (1965); Roy v. United States, _____ App. D. C. _____, 356 F. 2d 785 (1965); Nickens v. United States, 116 App. D. C. 338, 323 F. 2d 808 (1963), cert. denied 379 U. S. 905, 85 S. Ct. 198, 13 L. Ed. 2d 178.

When the government chose to delay the charges against appellant, the prejudice which this delay might cause to appellant's defense was foreseeable. If Mr. Boydston on December 19 did make a positive identification, the inability of the two police officers to confirm that identification posed at once the danger that an innocent man might be convicted. If Mr. Boydston on December 19 was uncertain, that danger was even more clearly flagged. In either case, now that the trial has demonstrated that substantial prejudice

did result from the government's delay, and that that delay was purposeful and unnecessary, the government is poorly positioned to resist dismissal. The prejudice which the government provoked is irreparable. The charges must be dismissed by reason of the Fifth and Sixth Amendments of the Constitution.

B. The Charges Should Have Been Dismissed For Unnecessary Delay In Presenting Them.

Rule 48(b) of the Federal Rules of Criminal Procedure empowers the Court to dismiss an indictment where there has been unnecessary delay in presenting the charges. This rule is an implementation of the right to a speedy trial provided in the Sixth Amendment of the Constitution, but leaves the Court discretion not allowed by the Sixth Amendment. Hanrahan v. United States, ____ App. D. C. ____, 348 F. 2d 363 (1965). For the reasons just set forth, the Court erred by denying appellant's motions to dismiss the charges against him on grounds of unnecessary delay.

II.

THE IDENTIFICATION

A. The Court Erred By Denying Appellant's Motion To View The Grand Jury Testimony Of Mr. Boydston.

In 1962 this Court held:

> "that when at trial the prosecution presents only one witness in support of the indictment, whose testimony is not otherwise corroborated, and where the testimony of this witness is contradicted by the

(4) Conclusion.

In narcotics cases, this Court has frequently examined the prejudice caused by delay in the presentment of a charge. In two respects this case is similar to the narcotics cases. In this case, as in the narcotics cases, the critical evidence lies within police domain. Also in this case, as in the narcotics cases, the critical testimony is given by witnesses who must rely for the refreshment of their recollections upon the notations of the police officer who conducted the inquiry. However, in this case, unlike the narcotics cases, there was no need for the government's delay. Ross v. United States, 121 App. D. C. 233, 349 F. 2d 210 (1965); Powell v. United States, ____ App. D. C. ____, 352 F. 2d 705 (1965); Roy v. United States, ____ App. D. C. ____, 356 F. 2d 785 (1965); Nickens v. United States, 116 App. D. C. 338, 323 F. 2d 808 (1963), cert. denied 379 U. S. 905, 85 S. Ct. 198, 13 L. Ed. 2d 178.

When the government chose to delay the charges against appellant, the prejudice which this delay might cause to appellant's defense was foreseeable. If Mr. Boydston on December 19 did make a positive identification, the inability of the two police officers to confirm that identification posed at once the danger that an innocent man might be convicted. If Mr. Boydston on December 19 was uncertain, that danger was even more clearly flagged. In either case, now that the trial has demonstrated that substantial prejudice

did result from the government's delay, and that that delay was purposeful and unnecessary, the government is poorly positioned to resist dismissal. The prejudice which the government provoked is irreparable. The charges must be dismissed by reason of the Fifth and Sixth Amendments of the Constitution.

B. The Charges Should Have Been Dismissed For Unnecessary Delay In Presenting Them.

Rule 48(b) of the Federal Rules of Criminal Procedure empowers the Court to dismiss an indictment where there has been unnecessary delay in presenting the charges. This rule is an implementation of the right to a speedy trial provided in the Sixth Amendment of the Constitution, but leaves the Court discretion not allowed by the Sixth Amendment. Hanrahan v. United States, ____ App. D. C. ____, 348 F. 2d 363 (1965). For the reasons just set forth, the Court erred by denying appellant's motions to dismiss the charges against him on grounds of unnecessary delay.

II.

THE IDENTIFICATION

A. The Court Erred By Denying Appellant's Motion To View The Grand Jury Testimony Of Mr. Boydston.

In 1962 this Court held:

> "that when at trial the prosecution presents only one witness in support of the indictment, whose testimony is not otherwise corroborated, and where the testimony of this witness is contradicted by the

> "defense, the trial judge shall, upon request, examine the Grand Jury testimony of that single witness for possible inconsistencies, and where any significant inconsistency appears to the trial judge he shall make the pertinent portions of the Grand Jury record available to the defense." Gordan v. United States, 112 App. D. C. 33, 299 F. 2d 117, 119 (1962).

Since appellant's trial, the United States Supreme Court has enunciated further the rule which requires that Mr. Boydston's testimony before the Grand Jury be made available to the appellant. Dennis v. United States, ___ U. S. ___, 16 L. Ed. 2d 973, 86 S. Ct. ___, decided June 20, 1966. See also this Court's opinion in Corley v. United States, ___ App. D. C. ____, No. 19,658 decided June 7, 1966.

The features that moved the Supreme Court in the Dennis case to remand so that the petitioners would on cross examination of the government's witnesses have available to them the Grand Jury minutes, are present here. The importance of keeping secret Mr. Boydston's Grand Jury testimony is minimal. Mr. Boydston at the time of trial was not able to testify on the basis of personal recollections alone. There is need to assay his testimony at trial against the fresher testimony before the Grand Jury. Mr. Boydston was the key witness. Appellant's guilt or innocence turned upon exactly what was said and exactly what was thought by Mr. Boydston when he made his identification on December 19. Mr. Boydston was hostile. He had chosen the side of the prosecution. Mr. Boydston testified that he was positive of his identification

throughout the entire nine months that had elapsed between the offense and the trial and this testimony was disputed by inconsistencies in Mr. Boydston's own testimony, by three witnesses produced by appellant, by two produced by the government and was indeed conceded by the prosecutor to be inaccurate. Appellant sought the Grand Jury minutes to refresh Mr. Boydston's recollections of uncertainties he earlier had and to test his credibility under oath. Appellant's case carried with it "the risk of wrongful attribution of responsibility x x x. In these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unclosed." Dennis v. United States, ___ U. S. ___, 16 L. Ed. 2d 973, 985, 86 S. Ct. ___, decided June 20, 1966.[4/]

Appellant has shown a particularized need outweighing the policy of secrecy. It was error to deny him a view of Mr. Boydston's testimony before the Grand Jury. Pittsburgh Plate Glass Company v. United States, 360 U. S. 395, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959); Harrell v. United States, 115 App. D. C. 169, 317 F. 2d 580 (1963); DeBinder v. United States, 110 App. D. C. 244, 292 F. 2d 737 (1961).

4/ In addition the failure of the prosecutor prior to trial to use the Grand Jury minutes to refresh Mr. Boydston's recollection of the December 19 line-up implies that a material inconsistency may be revealed. Simmons v. United States, 113 App. D. C. 369, 308 F. 2d 324 (1962).

B. The Court Erred By Allowing Leading Questions On The Redirect Examination Of Mr. Boydston.

The prosecutor's redirect examination of Mr. Boydston commences as follows:

> "Q. Mr. Boydston. I knew the defense counsel were talking to you, didn't I, that they had visited you?
>
> "A. Yes sir.
>
> "Q. Did I ever tell you not to talk to them?
>
> "A. No.
>
> "Mr. McGrail. I object. If government counsel is going to start leading this witness, I think it is very objectionable x x x." Tr. 356.

The objection was overruled. Leading questions continued, each clearly suggesting to the witness the reply desired even to the point of securing affirmation of direct quotations. For example:

> "Q. And do you remember you said, 'It's been a long time and I don't want to see an innocent man go to jail.'?
>
> "A. That is correct.
>
> "Q. And do you remember that I said to you then, 'Mr. Boydston, I don't want to see an innocent man go to jail either. That is why if you do identify him, it will have to be a positive identification.'? Is that what I said to you?
>
> "A. Those were your words.
>
> "Q. And those are my exact words, are they not?
>
> "A. They are." Tr. 358.

As could have been anticipated, this redirect examination concluded as follows:

"Q. When you did identify Johnson, whom you have identified in the courtroom, at the line-up, were you positive then that that was the man?

"A. I was.

"Q. And when you went out to the outer room at the confrontation, were you positive then that that was the man?

"A. I was.

"The Court. This is repetitious now, Mr. Wall.

"By Mr. Wall.

"Q. Are you positive today that the man you have identified was the man at the freezer?

"Mr. McGrail. This is repetitious, Your Honor. Objection.

"By Mr. Wall. Q. Are you positive today?

"A. I am." Tr. 359-360.

The law relating to allowance of leading questions has been stated as follows:

> "The essential test of a leading question is whether it so suggests to the witness the specific tenor or the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory. The evil to be avoided is that of supplying a false memory for the witness. 3 Wigmore, Evidence, §769 (3d ed. 1940); see also DeWitt v. Skinner, 232 F. 443, 445 (8th Cir. 1916). However, the extent to which the use of leading questions may be indulged or limited is a matter primarily for the discretion of the trial judge and an appellate court will intervene only if there is a clear abuse of discretion. Generally, abuse of discretion is not found in the absence of prejudice or clear injustice to the defendant." United States v. Durham, C.C.A. 4th, 319 F. 2d 590, 592 (1963).

In this case the allowance of these leading questions did prejudice the trial of the charges against appellant and did

do him a clear injustice. The cross examination of Mr. Boydston had revealed that appellant would produce witnesses who would testify that Mr. Boydston had on more than one occasion expressed uncertainty with respect to his identification of the appellant. The cross examination had revealed that at one or another time these uncertainties had come to the attention of the government. Mr. Boydston was known to be the sole identifying witness. By the close of the cross examination it had been shown that appellant's defense against the government's case for identification sought to disclose uncertainty in Mr. Boydston's December 19 identification. In these circumstances it was prejudicial and clearly unjust to allow the prosecutor to obtain from Mr. Boydston a series of replies, each bearing on the key identification issue, and each "likely to be given irrespective of an actual memory".

C. The Court Erred In Its Instructions On Identification

In appellant's trial the only real issue was the identification of the appellant. The Court's instructions should have focused the jury's attention on this issue. Gregory v. United States, ____ App. D. C. ____, No. 19,599 decided July 28, 1966. The instructions should have made clear that "if the circumstances of the identification were not convincing, they should acquit". McKenzie v. United States, 75 App. D. C. 270, 273, 126 F. 2d 533, 536 (1942). The Court

should have instructed the jury on the principal factors bearing on evaluation of Mr. Boydston's identification: namely, the difficulty of making an accurate observation in circumstances of excitement and haste, the possibility that Mr. Boydston's assailant wore a mask, the inability of the two police officers to identify appellant and the opportunity each officer had to observe the assailant. Levine v. United States, 104 App. D. C. 281, 282, 261 F. 2d 747, 748 (1958); Tatum v. United States, 88 App. D. C. 386, 391, 190 F. 2d 612, 617 (1951); Smith v. United States, ___ App. D. C. ___, 336 F. 2d 941 (1964).

The evidence showed that Mr. Boydston chose to testify after he had been instructed by the prosecutor that the prosecutor wanted a positive identification, or none at all. Tr. 337, 359-360, 624. The jury should have been instructed to scrutinize Mr. Boydston's testimony carefully to determine to what extent any uncertainty he may have had was submerged by reason of the prosecutor's instruction. Fletcher v. United States, 81 App. D. C. 306, 158 F. 2d 321 (1946).

The formal generalized instruction on identification contained in the Court's charge was not sufficient to guide the jury to evaluate fairly the case for identification. Salley v. United States, ___ App. D. C. ___, 353 F. 2d 897 (1965). Tr. 665-666.

D. The Court Erred By Communicating Privately With The Jury.

Of a private communication between judge and jury after lock-up, Judge Learned Hand wrote:

> "As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up, and we do not wish to abate that jealousy in the least; it is most undesirable that anything should reach a jury which does not do so in the court room. This is, indeed, too well settled for debate. Mattox v. United States, 146 U. S. 140, 150, 13 S. Ct. 50, 36 L. Ed. 917; Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 81, 39 S. Ct. 435, 63 L. Ed. 853; Dodge v. United States, 2 Cir., 258 F. 300, 303, 304, 7 A.L.R. 1510; Little v. United States, 10 Cir., 73 F. 2d 861, 864, 865, 96 A.L.R. 889. But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be merest pedantry to insist upon procedural regularity." United States v. Compagna, C.C.A. 2, 146 F. 2d 524, 528 (1945), cert. denied 342 U. S. 867, 65 S. Ct. 912, 89 L. Ed. 1422.

The Supreme Court has stated:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U. S. 140, 150, 13 S. Ct. 50, 36 L. Ed. 917 (1892).

The jury retired at 10:17 A. M. At 5:27 that afternoon, the jury being still out, the following occurred at the bench:

> "The Court: While we were assembling a few minutes ago, I had a note from the jury to this effect--this is my rough copy of it: 'Was it the testimony of Officer Kaclick that he exchanged gunshots with the man at the freezer?' I sent back an answer, 'Your recollection must govern.'" Tr. 681-682.

No objection was immediately made. Appellant later objected in a motion for retrial after verdict. Motion, September 3, 1965.

The Court's communication was accomplished "while we were assembling a few minutes ago", was without consulting counsel, and was prejudicial to appellant. Officer Kaclick in his testimony had made the following three observations of the man at the freezer:

(1) "I observed a negro male wearing a tan jacket and holding a nickel-plated revolver in his hand at approximately this position (indicating). He walked directly toward the rear of the store, passed the door and towards the walk-in freezer." Tr. 128.

(2) "At that time the subject that had walked over to the freezer started firing into the room toward Officer Blake. I then discharged two rounds toward this subject. He fired a numerous amount of rounds which I cannot determine how many. He then ran past the door. I fired one more. At approximately this position right here (indicating), he was joined by another subject and made their excape through the front entrance of the store." Tr. 130.

(3) On cross examination Officer Kaclick was asked whether "the individual who walked back to the rear and accosted Mr. Boydston had, as you say in this report, a stocking mask

"pulled over his face?" Officer Kaclick answered "That is what I had thought I seen." Tr. 146-147. 5/

Appellant was entitled, at the very least, to have the jury's inquiry answered in the affirmative. The failure to do so was prejudicial and accordingly the Court's private communication with the jury invalidated the verdict.

E. In The Charge To The Jury The Court Erred By Joining The Verdicts On Appellant and Gatlin.

Co-defendant Gatlin was shot down in the store. His presence at the scene was not questioned. His defense was that he was shot down at the very first instant and removed from all that followed.

5/ Officer Kaclick had testified on direct examination as follows:

"Q. x x x The first figure that went by to the freezer, did you notice whether he had a mask on or not?

"A. No, he didn't have no mask." Tr. 129.

Following the cross examination quoted above, the prosecutor on redirect asked: "Your testimony is you thought he had a mask on?

"A. That is correct." Tr. 217.

In Rebuttal Argument the prosecutor stated:

"x x x there was a conflict between Kaclick and Blake as to whether the man at the freezer was masked. They first realized that they disagreed in my office. How simple it would have been to smooth that over, just have Kaclick not mention that. Remeber, ladies and gentlemen, it was on redirect with a leading question--because I felt it was not clear and that you should know that there was perhaps a conflict here--I said, 'Officer Kaclick, didn't you think that the man behind the freezer had a mask?' He said, 'Yes, I did.'" Tr. Vol. A 64.

The Court included in its charge the following:

"If you find that Gatlin was the only defendant present at the scene of the crime, then in order for Gatlin to be guilty of the crime, you must find that his acts comprised all the elements of the alleged crimes as I shall outline them to you. If you find, however, that both Gatlin and Johnson were present at the scene of the crime and that they were acting together and in concert and for a common purpose, then it is not necessary that each defendant shall have committed each and every act that comprise the essential elements of the crime.

"The guilt of either defendant may be established without proof that he personally committed each of the acts which constitute the essential elements of the crime if it is proven beyond a reasonable doubt that the two defendants acting jointly and in concert together committed every essential element of the crime charged." Tr. 667-668.

One or more of the jurors may have mistakenly understood from this charge that if appellant was found by the jury not present at the scene, then Gatlin could be held guilty only if his acts comprised all elements of each crime as charged and that this could mean that Gatlin would be not guilty. No matter how mistaken, this is the literal sense of the Court's charge.

This linking of the jury's verdict on appellant with the jury's verdict on Gatlin was prejudicial to appellant. The case for identification against Gatlin was undisputed; the case against appellant close. The closeness of the case against appellant obligates this Court to review the charge with meticulousness. Cooper v. United States, ___ App. D. C. ___ D. C., 357 F. 2d 274 (1966); Inge v. United States, ____ App. D. C. ___, 356 F. 2d 345 (1966).

III.

THE UNRELATED OFFENSE

A. Showing An Unrelated Offense Was Error Requiring A New Trial.

The prosecution, over appellant's objection, opened its case with Officer Thomas showing appellant on December 19 with a loaded pistol in his pocket riding in a suspect car with four other men, two also armed with loaded pistols, two who departed more or less precipitately, and with a sawed-off shotgun lying buried under a towel in the trunk of the car. Tr. 38-53, see also Opening Statement on behalf of the government Tr. Vol. A 5-9. In the attempted robbery twelve days earlier three men had pistols and one a sawed-off shotgun.

Not only did this opening testimony prejudice appellant by showing a propensity to commit crime, more seriously this testimony prejudiced his defense by raising the speculation that these were the pistols and this was the sawed-off shotgun used on December 7. The pistols and the sawed-off shotgun seized on December 19 were displayed before the jury throughout the government's case. Tr. 434.

The prosecution had no legitimate need to show any participation by appellant in any of the events of December 19 which preceded the line-up. The prosecution had no legitimate need to show appellant's arrest on December 19 carrying a loaded revolver and in the company of Hargroves and Jones,

nor to show the sawed-off shotgun, never connected with the December 7 assaults.[6/]

> "It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. x x x
>
> "Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value." Drew v. United States, 118 App. D. C. 11, 331 F. 2d 85, 89, 90 (1964); see also Witters v. United States, 70 App. D. C. 316, 106 F. 2d 837 (1939).

The December 19 events which preceded the line-up had no conceivable relevance to (1) motive, (2) intent or (3) absence of mistake or accident. Cantrell v. United States, 116 App. D. C. 311, 323 F. 2d 613 (1963), cert. denied 376 U. S. 955, 84 S. Ct. 973, 11 L. Ed. 2d 973; Harper v. United States, 99 App. D. C. 324, 239 F. 2d 945(1956).

6/ The evidence was offered to show "How come Jones and Johnson are here and how they were apprehended." Tr. 22.

The pistols and shotgun seized on December 19 are unlike the tools of a confidence man. Payne v. United States, 111 App. D. C. 94, 294 F. 2d 723, cert. denied 368 U. S. 883, 82 S. Ct. 131, 7 L. Ed. 2d 83 (1961). The gun taken off Jones was identified by the FBI with the December 7 assaults. Even so, Jones' possession of that gun on December 19 was held too speculative standing alone for submission to the jury for the purpose of identifying Jones with the assaults twelve days earlier. Tr. 460. There was no evidence to show a common scheme or plan embracing the offenses committed on December 7 and December 19. Fairbanks v. United States, 96 App. D. C. 345, 226 F. 2d 251 (1955).

The evidence of appellant's participation in the events of December 19 prior to the line-up was admissible then only if relevant to identify appellant with the December 7 assault. On this issue, this evidence does stimulate speculation. But this speculation and its power to persuade rest on possibilities which in rational terms are remote and illusive. No means for measuring or judging the credence to be given these possibilities is logically available. Consequently for purposes of identification these possibilities, or

speculations, and this evidence was not relevant.[7/] See Martin v. United States, 75 App. D. C. 399, 127 F. 2d 865 (1942).

The Court prior to trial had severed the trial of the December 7 and 19 offenses. Each was relatively simple of proof. The Court might have allowed them to be tried together were it not for the prejudice which knowledge of the events of December 19 would cast upon the jury's determination of the appellant's identity with the offenses of December 7. Drew v. United States, 118 App. D. C. 11, 331 F. 2d 85 (1964). However, the prejudice which would have resulted from a joined trial of the two offenses was less than the prejudice which did result from showing the evidence of both in the trial of one. Had the separate offenses been tried together the jury could have found appellant guilty of the December 19 offense and not guilty of the December 7 offense. Instead, the jury, with the evidence of both offenses before it, had but one choice, to find appellant guilty or not guilty of the December 7 offense. The prejudice was apparent. The evidence of the December 19 offense was not admissible under any of the recognized exceptions. Freeman v. United States, 116 App. D. C. 213, 322 F. 2d 426 (1963);

7/ This evidence was not offered by the prosecution for identification. The Court in its charge instructed the jury not to use this evidence for any purpose except only to test appellant's credibility. Tr. Vol. A, 660-661.

Leigh v. United States, 113 App. D. C. 390, 308 F. 2d 345 (1961); Pyle v. United States, 81 App. D. C. 209, 156 F. 2d 852 (1946).

The prejudice done by showing the events of December 19 prior to the line-up was not later removed because appellant testified, or removed because in part some of this evidence might thereby have become relevant to appellant's credibility. See Johnson v. United States, 318 U. S. 189, 63 S. Ct. 549, 87 L. Ed. 704, rehearing denied 318 U. S. 801, 63 S. Ct. 826, 87 L. Ed. 1164 (1943). This evidence when admitted was not directed to the credibility issue and major portions of the prejudicial evidence have no bearing whatsoever upon appellant's credibility. For example, the showing of the sawed-off shotgun was not relevant to appellant's credibility.

The Court's instruction to the jury did not remove the prejudice which had been done. The shotgun, the appellant's December 19 offense, his arrest for that offense, his companions of that day could not possible be erased from the jury's mind. Gregory v. United States, ___ App. D. C. ___, No. 19,599 decided July 28, 1966; Boyer v. United States, 76 App. D. C. 397, 132 F. 2d 12 (1942). The impossibility of erasure was demonstrated by the warning given the jury in the prosecutor's closing argument: "If you consider anything else in your determination of their guilt, you are violating your oath. They are not on trial for being bad people. They are not on trial for committing some other crime at all. x x x" Tr. Vol. A 19.

Appellant's character was never in issue. To the extent that Officer Thomas' testimony constituted an initial attack upon appellant's character, it was totally improper and was cause for reversal. Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); Josey v. United States, 77 App. D. C. 321, 135 F. 2d 809 (1943).

Conclusion

The thinness of the prosecution's case for identifying appellant with the December 7 assaults demanded scrupulous attention to the rules for a fair trial. Corley v. United States, ____ App. D. C. ____, No. 19,658 decided June 7, 1966; Cross v. United States, ____ App. D. C. ____, 353 F. 2d 454 (1965); Jones v. United States, 119 App. D. C. 213, 338 F. 2d 553, 554 note 3 (1964). Instead the prosecution in its eagerness for a conviction has overstepped these rules. Trial errors have occurred, each more or less prejudicial to appellant's defense. In combination, if not singly, these trial errors compel reversal and remand for a new trial.

Respectfully submitted,

David Cobb
Counsel for Appellant
(Appointed by this Court)

October 28, 1966

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,780

JOHN A. JOHNSON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District Court
for the District of Columbia

DAVID COBB

Attorney for Appellant
(Appointed by the Court)
1908 Q Street, N. W.
Washington, D. C. 20009
DUpont 7-5424

December 30, 1966

I

CASE PAPER THIN

Appellee's Brief takes no note that the case against appellant was paper thin.

A single consideration lies at the core of each question presented by this appeal. Appellant's conviction depended upon finding beyond reasonable doubt first that Mr. Boydston on December 19, 1964, twelve days after the attempted robbery, positively identified appellant as his assailant, second that this identification was correct. The evidence to support these findings was minimal and tenuous. The paper thinness of the case against appellant is the single consideration critical to each question presented by this appeal.

Mr. Boydston, Officer Noone and Officer Blake testified that Mr. Boydston made a positive identification at the December 19 police line-up.[1/] However, none testified on personal

---

1/ Appellee's Brief indicates that Officer McElvane also "attested to the unqualified manner" of the identification made by Mr. Boydston. Officer McElvane's entire testimony on this issue reads as follows:

"Q. And what happened at that confrontation?

"A. Detective Noone called Mr. Johnson in and had him sit there and Boydston was sitting there, and he said, Is this the man that robbed you? And Mr. Boydston said, Yes, it is. Mr. Johnson said, Man, you never seen me before." Tr. 620.

Appellant's counsel chose not to inquire any deeper.

recollection alone.[2/] Prior to trial the recollection of each was refreshed by police notes made by Officer Noone. The notes were in a form not meaningful except to Officer Noone.

Appellee's Brief acknowledges at least in part this weakness in the testimony supporting Mr. Boydston's positive identification. Appellee's Brief notes that Mr. Boydston told defense witnesses that "he got only a 'fleeting glimpse' of appellant and that he saw 'one man in the line-up that reminded him more than the others of [his assailant] but that he could not positively identify him.'" Appellee's Brief, p. 12-13. Appellee's Brief notes that "defense witnesses admittedly showed that Boydston was uncertain before trial as to the type of identification he had made many months ago." Appellee's Brief, p. 13. Appellee's Brief concedes that "Boydston could not recall exactly what happened at the line-up without reference to notes taken by a police officer." Appellee's Brief, p. 10. Appellee's Brief cites Mr. Boydston's "manifest uncertainty before trial." Appellee's Brief, p. 13, footnote 13.

2/ Officer McElvane was also present at the pretrial conference when Officer Noone's notes were used to refresh Mr. Boydston's recollection of the December 19 line-up, and when Mr. Boydston was instructed that if he identified appellant "it will have to be a positive identification." Tr. 624-626.

However, Appellee's Brief fails to note that Mr. Boydston's testimony was directly contradicted by the appellant.[3/] Appellant testified that Mr. Boydston stated at the December 19 confrontation that appellant "might be" his assailant. Tr. 525. Legal Aid Investigator Reed testified that Mr. Boydston told him that at the confrontation he had asked appellant "aren't you one of the men that was in the store" and appellant had denied that he was. Tr. 585. Appellee's Brief also fails to note that Mr. Boydston's testimony was further contradicted by Officer Kaclick's observation that Mr. Boydston's assailant wore a stocking mask over his face. Tr. 146-147, 217. Appellee's Brief fails to note that each of the witnesses who testified that Mr. Boydston made a positive identification on December 19 was present at a pretrial conference during which the prosecutor instructed Mr. Boydston that "if you do identify him it will have to be a positive identification." Tr. 606, 624-625, 358. Indeed, Appellee's Brief makes no mention of this pretrial instruction given by the prosecutor to Mr. Boydston.

Further, assuming Mr. Boydston did positively identify appellant on December 19, there was substantial evidence to show that this identification may have been mistaken. Appellee's Brief takes no note of any of this evidence. Appellee's Brief fails to

---

3/ Appellee's Brief states that Mr. Boydston's testimony describing his December 19 identification and confrontation of appellant "was not directly contradicted by any other witnesses." Appellee's Brief, p. 12.

note that the two police officers who witnessed the attempted robbery did not identify appellant. Appellee's Brief fails to note that Mr. Boydston was totally unable to specify any feature of the assailant on which he rested his identification. Appellee's Brief makes no mention that Mr. Boydston was shown to have stated on December 19, shortly after viewing the line-up, and to have repeated on at least one subsequent occasion that "he did not want to see an innocent man go to jail." Tr. 622, 358.

Appellee's Brief barely mentions that Mr. Boydston's identification constituted the only evidence to connect appellant with the attempted robbery. Appellee's Brief, p. 19.

The case for identification of the appellant was patently paper thin. Appellant conceives this to be a paramount consideration basic to each of the questions presented by this appeal. The failure of Appellee's Brief to take note of the thinness of the case for identification marks a principal point of difference between appellant and appellee.

II

DELAY BETWEEN ARREST AND INDICTMENT

Appellant has argued that the delay between arrest and indictment prejudiced his defense. Appellee denies this argument and claims instead that the delay prejudiced the prosecution's

case for identification.[4]

The prosecution's case for identification would certainly have been prejudiced, indeed defeated altogether, if by reason of the delay Mr. Boydston, when he was faced with the choice of making a positive identification or none at all, had chosen to make none at all. However, once Mr. Boydston chose to testify and to state the positive identification required by the prosecutor, then the delay prejudiced the appellant's ability to refute Mr. Boydston's statement of a positive identification made on December 19, 1964.

Another way of stating the argument made by appellee is to say that the delay prejudiced a showing of what did truly happen at the December 19 line-up. If on that occasion Mr. Boydston truly did make a positive identification, the delay did constitute a threat to the prosecution's ability to prove that positive identification. On the other hand, in case Mr. Boydston did not make a positive identification on December 19, then the delay has prejudiced the appellant's ability to show Mr. Boydston's December 19 uncertainty.

4/ Appellee's Brief states: "The delay instead weakened the prosecution's case by causing its witness not to recall whether he had made a 'positive identification' when he viewed appellant upon the latter's arrest." Appellee's Brief, p. 6.

The concern of the Court in the cases which have been cited by the parties is directed toward establishing truth and protecting the innocent against erroneous conviction. Because in this case the delay affects both identification and notice of the charge, this case falls clearly within the area of the Court's earlier expressed concern.

Appellee's contention that the testimony of the three alibi witnesses was consistent and unshakeable is not applicable to that portion of their testimony concerned with dating the particular evening they described. Unfortunately for the appellant, no one of the witnesses was able to date that evening in a convincing way. Appellant was confused over the date at the very outset of cross examination. Tr. 530. Miss Perry testified that she had not tried to identify the evening until after the indictment came down in April of 1965. She endeavored to identify the particular evening first by the Danny Thomas TV show, and when this failed, by reference to another "lady I stay with". The latter did not testify. Tr. 564-566. Mrs. Morgan displayed complete confusion as to how and when she dated the evening she described. Tr. 576-578. No one of the three witnesses directly connected the traffic ticket issued in the early morning of December 7 with the evening they described. The testimony of all three lends credence to the prosecutor's contention in his closing argument that these witnesses were not able in April of

1965 to know with certainty that the eventy they described in their testimony occurred on the evening of December 7, 1964. Tr. 27-28, 29.[5/]

III

INSPECTION OF THE GRAND JURY MINUTES

Appellee seeks to support the refusal to permit inspection of the Grand Jury minutes by contending that Mr. Boydston's testimony positively identifying appellant on December 19 "was not directly contradicted by any other witnesses". Appellant did directly contradict this testimony. Tr. 525. More important, the key issue at trial turned on the reliability of Mr. Boydston's recollection regarding the December 19 identification. Before trial his recollection of this December 19 identification had been refreshed following three months of what the appellee describes as "manifest uncertainty". Mr. Boydston's Grand Jury testimony was

---

5/ In this case the prejudice that results from the delay in giving appellant notice of the charge arises because of impairment of appellant's ability to reconstruct and first recall where he was at a given past date and hour. The ability to retain in memory a once recalled event is distinct from, and far exceeds, the ability to reconstruct and first recall a past event. Accordingly a delay which causes prejudice by reason of the fading memory of witnesses to a once recalled event may be ruled by a quite different, and considerably longer, time span than delay which causes prejudice by impairing the more limited ability to reconstruct and first recall a past event.

given before this period of "manifest uncertainty" was shown to have begun. A real possibility exists that the Grand Jury testimony given in early April 1965 contains Mr. Boydston's descripton of his December 19 identification of appellant based upon personal recollection alone. The need to view his fresher testimony given before the months of manifest uncertainty is abundantly clear.

IV

THE PRIVATE COMMUNICATION TO THE JURY

Appellant is concerned by the private nature of the trial Court's communication to the jury. The communication took place outside the presence of appellant and appellant's counsel. The trial Court later reported its communication to counsel as a fait accompli. Even then, the Court did not invite discussion, objection or exception.

Appellee's misconception of appellant's contention with respect to the private communication between the trial Court and the jury may be due to the failure of Appellant's Brief to cite Rule 43 of the Federal Rules of Criminal Procedure. Appellant's Brief clearly should have cited Rule 43 which requires the presence of the defendant "at every state of the trial". Appellant's Brief clearly should have drawn to appellee's attention the decision of this Court in Walker v. United States, 116 U. S. App. D. C. 221, 322 F. 2d 434 (1963) cert. denied 375 U. S. 976, 84 S. Ct. 494, 11 L. Ed. 2d 421.

In the Walker case, the appellant took no exception and made no objection at the trial. This Court adopted in the Walker case the statement of Judge Learned Hand cited in Appellant's Brief, indicating that this statement "was in obedience to, and was required by, Criminal Rule 52(a): 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" Walker v. United States, 322 F. 2d 434 (1963) at 435. This Court's statement of its holding in the Walker case reads:

> "Accordingly we hold that the trial judge's impropriety in communicating with the jury out of the presence of Leroy Walker does not require reversal if the record affirmatively shows the communication had no tendency to influence the verdict against him. In the language of the Tenth Circuit's Jones case, supra, we cannot let Leroy's conviction stand 'unless the record completely negatives any reasonable possibility of prejudice' to him arising from the judge's error." Walker v. United States, 322 F. 2d 434 (1963) at 436. Jones v. United States, 299 F. 2d 661, 662, cert. denied 371 U. S. 864, 83 S. Ct. 123, 9 L. Ed. 2d 101 (1962).

The trial Court's private communication with the jury during appellant's trial did tend to influence the verdict against the appellant. Officer Kaclick testified that Mr. Boydston's assailant wore a stocking mask over his face. Mr. Boydston contradicted this. The opportunity that Officer Kaclick had to observe Mr. Boydston's assailant was necessary to evaluate critically the possibility of error in Mr. Boydston's identification. The transcript does show that Officer Kaclick of all the witnesses had probably the fullest opportunity to observe Mr. Boydston's

assailant, and indicative of this in part, that he did exchange shots with Mr. Boydston's assailant.

The jury's inquiry disclosed that one or more jurors had resolved the conflict between the testimony of Officer Kaclick and of Mr. Boydston believing that Officer Kaclick had not exchanged shots with Mr. Boydston's assailant. Had this juror, or these jurors, recalled Officer Kaclick's testimony correctly--or had they obtained from the Court a simple affirmative answer to the jury's inquiry--one or more of these jurors might have resolved the conflict in the testimony by concluding that a reasonable doubt existed as to whether Mr. Boydston did, or could have, correctly identified the appellant.

V

COURT'S JURY INSTRUCTIONS

Appellee shows that appellant's trial counsel did not take objection to some parts of the instructions now claimed by appellant to be in error. Appellant's trial counsel requested the Court to include in its jury instructions an enlargement of the charge on identification and also a clarification of the Court's instruction on the separateness of the verdicts as to Gatlin and Johnson.

These requests were made in terms as follows:

"Mr. McGrail: The Court instructed the jury in respect to the identification of the participants in the attempted robbery. I would ask the Court to instruct the jury they may take into consideration the number of identification witnesses, namely, one in this instance and the age and intelligence and ability to observe of that one identification witness, and to take into consideration that although there were others present at the time none of the others could make an identification." Tr. 678-679.

* * * * *

"Mr. McGrail: In respect to the possible verdicts, I may be unduly wary on this score but the Court instructed the jury they could find in respect to each count guilty or not guilty as to Gatlin and Johnson. I would ask the Court to explain to the jury that they can find one guilty and one innocent; that it is not necessary that they find both guilty or both innocent." Tr. 680.

The Court denied both these requests. No request was made for an instruction to bring to the jury's attention the possible effects of the prosecutor's pretrial instruction to Mr. Boydston: " x x x if you do identify him, it will have to be a positive identification". Tr. 358.

VI

THE UNRELATED OFFENSE

Appellee argues that the testimony showing appellant arrested on December 19 carrying a dangerous weapon was relevent to the prosecutor's case to identify co-defendant Jones with the attempted robbery. The record does not support this. The prosecutor's only evidence to identify co-defendant Jones with the attempted robbery was the ballistic evidence and the gun which was taken from Jones on December 19, 1964. Neither the prosecutor nor the Court considered that co-defendant Jones could be identified with

the attempted robbery by reason of his arrest on December 19 in company with the appellant. The trial Court, when granting the motion of co-defendant Jones for acquittal, stated: "There is no evidence putting Jones at the scene of the crime other than the gun." Tr. 460.

Respectfully submitted,

David Cobb
Counsel for Appellant
(Appointed by this Court)

December 30, 1966